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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MICHAEL STEPHEN ZERR, Defendant - Appellant.	No. 05-35097 D.C. Nos. CV-04-01020-MA CR-02-00518-MA MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Submitted March 8, 2006**

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Federal prisoner Michael Stephen Zerr appeals from the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct the 51-month sentence imposed following his guilty plea conviction of being a felon in possession of a firearm. We have jurisdiction pursuant to 28 U.S.C. § 1291.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We affirm the district court's denial of Zerr's § 2255 motion. At the time he was sentenced, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not apply to Guidelines calculations made within the statutory maximum. *See United States v. Alvarez*, 358 F.3d 1194, 1211 (9th Cir. 2004). Further, neither *Blakely v. Washington*, 542 U.S. 296 (2004), nor *United States v. Booker*, 543 U.S. 220 (2005), apply retroactively to cases where the conviction became final prior to their publication. *See United States v. Cruz*, 423 F.3d 1119, 1120-21 (9th Cir. 2005) (holding that neither *Blakely* nor *Booker* apply retroactively on collateral review).

Finally, Zerr has not established that his trial counsel's failure to raise *Apprendi* at sentencing was unreasonable under prevailing professional standards or that there is a reasonable probability that, but for any of counsel's alleged errors, the result of his criminal proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

AFFIRMED.